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Federal Communications Commission  
Office of Secretary

April 21, 1997

By Hand

Mr. William F. Caton  
Acting Secretary  
Federal Communications Commission  
1919 M Street, NW  
Washington, DC 20554

Re: Fifth Notice of Proposed Rulemaking  
CC Docket No. 92-297

Dear Mr. Caton:

On behalf of CellularVision USA, Inc., enclosed please find an original and four (4) copies of its Comments filed in the above-referenced rulemaking proceeding.

Please direct any questions regarding this matter to the undersigned.

Sincerely,



Michael R. Gardner  
Counsel for CellularVision USA, Inc.

Enclosures

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Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, DC 20554

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APR 21 1997

Federal Communications Commission  
Office of Secretary

In the Matter of )

Rulemaking to Amend Parts 1, 2, 21 )  
and 25 of the Commission's Rules to )  
Redesignate the 27.5-29.5 GHz )  
Frequency Band, to Reallocate the )  
29.5-30.0 GHz Frequency Band, to )  
Establish Rules and Policies for Local )  
Multipoint Distribution Service and for )  
Fixed Satellite Services )

CC Docket No. 92-297

**COMMENTS OF CELLULARVISION USA, INC.**

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April 21, 1997

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## **SUMMARY**

In this *Fifth Notice of Proposed Rulemaking* ("*Fifth NPRM*"), the Commission should adopt flexible partitioning and disaggregation rules in order to facilitate the rapid deployment of LMDS and ensure maximum small business involvement. In order to allow the marketplace to reap the competitive benefits that are at the core of a sound partitioning and disaggregation policy, the Commission should adopt the following proposals:

- Parties should be able to partition BTA licenses based on any service area defined by the parties.
- Consistent with Broadband PCS and WCS, the Commission should refrain from imposing disaggregation minimums or maximums and allow the marketplace to determine how much spectrum disaggregates will acquire.
- Partitioning and disaggregation combinations should be permitted, as this affords LMDS licensees increased flexibility in building out their systems.
- Assignors and assignees in partition or disaggregation arrangements must be given the option to meet their *individual* construction obligations — which would then be reviewed by the Commission in separate and independent license renewal proceedings. Under this approach, the Commission can assess both the assignor and assignee's renewal separately under its flexible "substantial service" benchmark depending on the geographic size and/or amount of spectrum assigned and the particular type of service offered.
- While an assignee should assume the original license term of its assignor, in order not to discourage licensees from utilizing partitioning and disaggregation during the latter stages of the license term, the assignee should receive a "renewal expectancy" based on its reduced license period. For example, if the assignee acquires a partitioned service area at year seven of a license term, the Commission should base its substantial service determination on a three-year license term rather than the original ten-year term.
- A small business eligible for installment payments should be indebted to the FCC only for the actual price paid for the partitioned or disaggregated spectrum

where the purchase price is less than Commission's objective valuation. Furthermore, in non-monetary transactions, where an assignee acquires a partitioned area or disaggregated spectrum under a barter-type arrangement, or in exchange for an equity interest in the assignee's company, the debt obligation should remain with the original licensee. Under this scenario, the assignee will hold its partitioned license subject to the original licensee's fulfillment of its payment obligations.

As this country's sole LMDS licensee, CellularVision believes that by implementing this flexible and reasoned regulatory approach to this important final phase of the LMDS rules, the Commission's vision for LMDS will be realized in the near term as LMDS auctions will empower innovative entrepreneurs to provide the panoply of competitive LMDS-based choices in interactive video, telephony and data services throughout the United States.

Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, DC 20554

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Establish Rules and Policies for Local	)	
Multipoint Distribution Service and for	)	
Fixed Satellite Services	)	
_____	)	

**COMMENTS OF CELLULARVISION USA, INC.**

CellularVision USA, Inc.<sup>1</sup> ("CellularVision") by its attorneys, hereby files Comments in response to the *Fifth Notice of Proposed Rulemaking ("Fifth NPRM")* (FCC 97-82) adopted March 11, 1997 in the above-referenced proceeding.

**I. INTRODUCTION**

During the past eleven years, the principals of CellularVision<sup>2</sup> have pioneered

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<sup>1</sup> CellularVision USA, Inc. is publicly traded on the NASDAQ National Market under the symbol "CVUS."

<sup>2</sup> For purposes of this document, references to "CellularVision" include the following related companies which are majority owned and controlled by common principals: Suite 12 Group, which commenced the development of LMDS in the 28 GHz band; and CellularVision of New York, L.P., which operates a commercial LMDS service in the New York Primary Metropolitan Statistical Area in the 28 GHz band pursuant to a commercial license granted by the Commission in 1991. *See Hye Crest*

the development of LMDS, beginning in 1986 with initial testing to determine whether a multi-cell broadband delivery system could be deployed in the unused 28 GHz band and highlighted in 1991 by the Commission's grant of a commercial license to deploy LMDS in the New York PMSA. As the only commercially licensed LMDS provider in the United States, CellularVision applauds the Commission for its continued commitment to licensing LMDS in the 28/31 GHz bands by finalizing, in large part, the nationwide LMDS service and auction rules on March 13, 1997.<sup>3</sup> CellularVision remains confident that with the completion of the *Fifth NPRM* comment cycle on May 6th, the Commission will promptly complete its deliberations on the rules attendant to implementing partitioning and disaggregation in order to proceed with the nationwide auctions of LMDS — an exciting new wireless service that will afford consumers an important competitive choice in interactive video, telephony and data services.

## **II. LMDS PARTITIONING AND DISAGGREGATION**

In the *Fifth NPRM*, the Commission seeks comment on the procedural and technical application of numerous LMDS service and auction rules for licensees who choose to partition and/or disaggregate spectrum allocated to LMDS in their BTA service areas. At the outset, before discussing the Commission's specific proposals,

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*Management, Inc.*, 6 FCC Rcd 332 (1991).

<sup>3</sup> See *Second Report and Order, Order on Reconsideration, and Fifth Notice of Proposed Rulemaking*, CC Docket No. 92-297, released March 13, 1997 ("*LMDS Second Report & Order*" or "*Fifth NPRM*")

CellularVision urges the Commission when finalizing these partitioning and disaggregation rules to remain steadfast to its original rationale for adopting these dual policies — namely, affording LMDS licensees the ultimate flexibility to make a partial assignment<sup>4</sup> of their license in order to “encourage spectrum savings, encourage more rapid deployment of services in the LMDS spectrum, and leave the decision of determining the correct size of licenses to the licensees and the marketplace.”<sup>5</sup>

This much needed regulatory flexibility sought by the Commission is particularly critical for partitioning and disaggregation because of the *unique* nature of LMDS. In fact, as the Commission recognized, the unique nature of LMDS, both in cell structure and multi-faceted service offering potential, permits partitioning and disaggregation to serve as “powerful tools”<sup>6</sup> allowing licensees to concentrate on core areas and/or deliver specific services. Accordingly, unlike many of the rules adopted in the Commission’s two most recent decisions implementing partitioning and disaggregation in Broadband PCS<sup>7</sup> and the Wireless Communications Service (“WCS”),<sup>8</sup> the

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<sup>4</sup> For simplicity, CellularVision will refer at times to partitioning and disaggregation as an agreement between an “assignor and assignee,” although technically it is obviously a “partial” assignment of a geographical service area, an amount of spectrum, or a combination of both.

<sup>5</sup> *LMDS Second Report & Order*, para. 145.

<sup>6</sup> *Id.*

<sup>7</sup> See *In the Matter of Geographical Partitioning and Spectrum Disaggregation by Commercial Mobile Radio Services Licensees, Report and Order and Further Notice of Proposed Rulemaking*, WT Docket No. 96-148 (released December 20, 1996)



Commission must afford LMDS licensees even greater flexibility in several important areas if the Commission's goals of deploying LMDS as rapidly as possible and promoting small businesses are to be realized.<sup>9</sup>

As discussed below, by implementing appropriately flexible rules as detailed by CellularVision, the Commission will "ensure realization of the competitive benefits that are at the core of our partitioning and disaggregation policy."<sup>10</sup> At the same time, flexible partitioning and disaggregation rules will provide the necessary marketplace flexibility for LMDS licensees, who "are in the best position to analyze their business plans, to assess new technology and to determine consumer demand."<sup>11</sup>

#### **1. Parties Should Define Partitioned License Areas**

CellularVision concurs with the Commission's tentative conclusion to permit LMDS BTA licenses to be partitioned based on *any service area* defined by the parties, as opposed to mandating adherence to county lines or some other artificially fixed boundary. Permitting LMDS parties to take into consideration unique geographical characteristics and accompanying population clusters of a BTA, which

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*("PCS Partitioning and Disaggregation Order").*

<sup>8</sup> See *In the Matter of Amendment of the Commission's Rules to Establish Part 27, the Wireless Communications Service ("WCS")*, Report and Order, GN Docket No. 96-228 (released February 19, 1997) (*"WCS Partitioning and Disaggregation Order"*).

<sup>9</sup> See *LMDS Second Report & Order*, para. 145.

<sup>10</sup> *Fifth NPRM*, para. 409.

<sup>11</sup> See *LMDS Second Report & Order*, para. 145.

seldom are synonymous with pre-defined fixed boundaries, will ensure flexible and efficient partitioning agreements and allow the marketplace to determine the most suitable service areas.

With regard to technical interference considerations, the parties should retain the unfettered ability to address any potential adjacent interference amongst themselves by private agreement. Nonetheless, as new LMDS licensees, partitionees must comply with all relevant technical and service rules, including those contained in Section 101.103(g)&(h) of the Commission's rules regarding frequency coordination procedures.<sup>12</sup>

## **2. Minimum/Maximum Disaggregation Standards Are Unnecessary**

Like partitioning, the Commission should encourage disaggregation by declining to require any pre-ordained spectrum "minimums" or "maximums." The Commission already rejected similar "standard" proposals for Broadband PCS and WCS.<sup>13</sup> Moreover, CellularVision is unaware of any potential Commission problem relating to "tracking" small portions of disaggregated spectrum or reviewing disaggregation proposals in an "expeditious" fashion because of the amounts of disaggregated spectrum. The FCC recognized that setting artificial minimums in Broadband PCS may

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<sup>12</sup> See *LMDS Second Report & Order*, paras. 277-281; see also 47 C.F.R. 101.103(g)&(h).

<sup>13</sup> See *PCS Partitioning and Disaggregation Order*, paras. 48-49; see also *WCS Partitioning and Disaggregation Order*, para. 99.

have forced disaggregates to take more spectrum than needed, leaving spectrum unused or, alternatively, foreclosing disaggregation entirely by imposing onerous spectrum amounts.<sup>14</sup> Minimums would have a similar adverse impact on LMDS disaggregates.

With regard to maximum limits, the Commission's record of any potential need for standards is equally vacuous.<sup>15</sup> Disaggregation is no different from partitioning where the Commission is proposing to abstain from regulation by allowing parties to define their own service area boundaries within a BTA. LMDS licensees will pay for their spectrum at auction and the Commission certainly should adopt its unjust enrichment provisions to disaggregates.<sup>16</sup> Moreover, as the Commission proposed in the *Fifth NPRM*, agreements to disaggregate spectrum will be considered a partial license assignment requiring prior Commission approval.<sup>17</sup> Accordingly, the Commission need not set any maximum spectrum caps governing disaggregation, as marketplace-driven flexibility will promote a broader mix of service offerings due to LMDS' many capabilities.

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<sup>14</sup> See *PCS Partitioning and Disaggregation Order*, para. 48.

<sup>15</sup> See *supra*, note 13.

<sup>16</sup> See *Fifth NPRM*, para. 422.

<sup>17</sup> See *id.*, para. 424.

### **3. Combined Partitioning and Disaggregation Should Be Permitted**

CellularVision agrees with the Commission's tentative conclusion that "combined" partitioning and disaggregation should be permitted. Allowing an LMDS licensee to disaggregate a particular amount of spectrum within a specific partitioned area of a BTA provides further flexibility for any agreement that facilitates LMDS build-out and competitive service offerings. Additionally, this flexible proposal would permit an entity to combine partitioned and/or disaggregated spectrum from different licensees in the same BTA, i.e., 1150 and 150 MHz blocks, or from different LMDS licensees in adjoining BTAs.

### **4. Construction Requirements Must Be Based on Independent Certifications**

Although CellularVision applauds the Commission's creative effort in establishing a bifurcated approach for partitionees and disaggregates to meet their construction requirements, assignors and assignees must be given the option in both instances to meet their *individual* obligations — which would then be reviewed by the Commission in separate and independent license renewal proceedings.<sup>18</sup>

Specifically, with regard to partitioned service areas, the Commission proposes

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<sup>18</sup> Although the Commission clearly provides an individualized option in a partitioned environment, the Commission's proposal governing disaggregation is less than clear on this point. *See Fifth NPRM*, para. 417 ("if one party takes responsibility for meeting the performance requirement, then actual performance by that party would be taken into account in a renewal proceeding at the end of the license term, but such performance would not affect the status of the other party's license" [who, in turn, retains its own obligation to meet the Commission's construction requirements]).

that the partitionee “certify that it will satisfy the same construction requirements as *the original licensee*.”<sup>19</sup> However, the Commission has adopted a uniquely flexible “substantial service” construction requirement for LMDS that contains an accompanying “safe harbor” provision to accommodate remote service offerings and the wide variety of possible niche service offerings, including “specialized or technologically sophisticated services.” All of the discrete services do not require a high level of coverage to provide benefit to consumers. Accordingly, it is highly probable that the partitionee’s service offering(s) may be different in scope from its partitionor. For example, it makes little practical or administrative sense to hold a partitionee offering high-capacity data services to a discrete consumer base to the same requirements as a broad-based video provider partitionor. Thus, the Commission should simply clarify that the partitionee must meet the requirements of the *Commission’s* LMDS construction requirements, as opposed to the requirements of the original licensee.

Similarly, the Commission should confirm that disaggregating parties have the option of submitting *separate* certifications, stating that each will be responsible for its own performance requirement. Importantly, for disaggregated or “combined” licenses, CellularVision remains skeptical that the original licensee or the disaggregatee will want to incur the obligation for both parties. Moreover, under the Commission’s second proposal, the original licensee should not have to rely on the

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<sup>19</sup> *Id.*, para. 416 (*emphasis added*).

performance of an independent assignee for its license renewal under a "joint sharing" agreement. Accordingly, unlike the more stringent geographically-based construction requirements for PCS, it would not be inconsistent in this instance for the Commission to require separate and independent "substantial service" construction requirements *as one option* for LMDS disaggregators and disaggregatees in their respective spectrum portions.<sup>20</sup>

In sum, for disaggregated, partitioned, and "combined licensed" entities, CellularVision urges the Commission to create an "independent certification" process. Under an independent certification process, the assignor and assignee each certify to their own *independent* responsibilities to meet the Commission's flexible construction requirements. The Commission, in turn, can then assess each licensee at renewal separately under its flexible "substantial service" benchmark depending on the geographic size and/or amount of spectrum assigned, the particular type of service offering(s), as well as any other intangibles applicable to the licensee and its consumer base.

**5. Assignees Assume Original License Terms With Modified Renewal Expectancy**

CellularVision generally agrees with the Commission's proposal to allow assignees to adopt the 10-year license terms of the assignor, instead of re-starting the 10-year term when the partial assignment occurs. Although CellularVision

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<sup>20</sup> See generally, *PCS Partitioning and Disaggregation Order*, para. 61.

recognizes that granting each assignee a new, independent 10-year license term is administratively cumbersome, CellularVision believes that the Commission is misguided when it suggests that imposing this renewal expectancy on the assignee will provide "maximum incentive" for parties to pursue available spectrum "as quickly as practicable." In reality, CellularVision believes that partitioning and disaggregation can be equally effective tools during *all* phases of the initial 10-year license term. For example, a prospective partitionee could materialize in the middle of the license term to serve an area where the original licensee, for whatever reason, has yet to build-out. Moreover, as the original pioneer of the technology, CellularVision anticipates that as technology advances, it is quite possible that additional, unforeseen uses and service offerings could spur growth and attendant disaggregation agreements at a later time within the initial 10-year license term.

Accordingly, although CellularVision agrees that all assignees should assume the original license term of its assignor, the assignee should receive a "renewal expectancy" which is based on its reduced license period. Obviously, for example, it would be inequitable to require a partitionee with a three-year initial license term to attain a comparable "substantial service" level to that of the original licensee. The Commission must clarify this point to prevent the final rule from discouraging licensees from utilizing partitioning and disaggregation during the latter stages of its license term when legitimate reasons for utilizing these tools may arise. At the same time, however, since the Commission retains the ability to approve or deny any potential assignment, the Commission can put original licensees on notice in its rules

that excessive partitioning or disaggregation late in license term will be scrutinized closely to prevent circumvention of the Commission's construction requirements.<sup>21</sup>

#### **6. Competitive Bidding Rules Must Conform to Marketplace Realities**

The Commission's proposal to apply its LMDS competitive bidding rules to partitioned and disaggregated licenses fails to consider certain marketplace realities facing small business assignors *and* assignees. The Commission proposes that partitionees and disaggregatees that qualify as small businesses "should be able to pay their *pro rata* share of the remaining government obligation through installment payments."<sup>22</sup> Further, the Commission's proposal also suggests using population as the "objective measure" to calculate the relative value of a partitioned area and the "amount of spectrum" in the case of disaggregation.<sup>23</sup> However, this proposal fails to account for situations where (1) the agreed upon purchase price is less than the Commission's objective valuation; and (2) small businesses enter into a non-monetary partitioning or disaggregation agreement. Accordingly, CellularVision suggests that the Commission's proposal serve merely as one payment option which the parties could choose.

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<sup>21</sup> For example, the Commission could require original licensees filing assignment applications in the last three years of a term to include an exhibit updating the Commission on the status of its build-out and service capacity.

<sup>22</sup> *Fifth NPRM*, para. 421.

<sup>23</sup> *Id.*



Obviously, if a small business assignee does not have sufficient funds to make a lump sum payment to the Government, the parties can reach an agreement requesting that the Commission dissolve the original financing agreement and re-issue two separate financing agreements, obligating each party to repay its *pro rata* share of the remaining debt.

However, with regard to installment payments and the Commission's attempt to apportion a *pro rata* share of the outstanding obligation between the parties, the Commission must create an exemption of its proposed valuation methodology when the actual price paid to the assignor is *less* than the Commission's objective valuation. For example, in the Broadband PCS context when apportioning the remaining debt obligations between two small businesses, the Commission assumes that the per pop valuation, i.e., 25% of the BTA, will permit it to divide the outstanding balance between the parties in a 75/25 split, leaving the partitionee to pay 25% of the remaining debt through Government installment payments.<sup>24</sup> However, it is more realistic to assume that there are many variables that may cause the actual purchase price to be less than the Commission's objective valuation. Obviously, to hold the assignee liable under an installment plan scenario for a greater obligation than agreed is unworkable. Accordingly, in instances where the purchase price is less than the Commission's per pop or amount of spectrum valuation, the actual purchase price should be used to apportion the remaining debt between the parties for installment

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<sup>24</sup> See *PCS Partitioning and Disaggregation Order*, note 125.

plan purposes.

Secondly, and perhaps more importantly, the Commission's auction proposal assumes that the assignment agreement is based on a monetary exchange. This approach ignores the possibility that partitioning or disaggregation agreements among small businesses could be based on a barter-type or equity arrangement. Whether it's services, equipment, technology licensing, or a non-controlling equity position, not all agreements will be on a cash only basis. Accordingly, the Commission's rules must account for such marketplace-driven arrangements. Obviously, in the case of a non-monetary agreement, the Commission cannot require the assignee to remit an objective valuation payment to the Government, as this would constitute an inequitable double payment. Accordingly, for non-monetary agreements, the ultimate debt obligation necessarily will have to remain with the original licensee. CellularVision realizes that the Commission most likely will require the assignee's license to be conditioned upon the assignor's fulfillment of its outstanding obligation. Thus, under this scenario, the original licensee is liable for the entire obligation and the Commission could reacquire the entire BTA service area in the case of default by the original licensee.

Finally, in situations where a small business licensee reaches an agreement with a non-qualifying small business, CellularVision agrees entirely with the Commission's desire to prohibit unjust enrichment by unintended beneficiaries. The Commission's proposal to follow the objective standards adopted for Broadband PCS should be suitable to accomplish this goal.

## **7. Assignees Should Conform to All LMDS Service Rules**

CellularVision concurs with the Commission's suggestion to require all assignees to comply with all LMDS technical and service rules. As noted above with regard to service area definitions, the parties' agreement will set forth any adjacent interference guidelines amongst the parties, while the assignee will also be responsible for complying with all of the relevant LMDS service and technical rules. Likewise, the proposal to subject all partitioning and disaggregation agreements to the Commission's formal license assignment process is sound. Among other things, this will allow the Commission to review each proposal on a case-by case basis, permitting the Commission to review large or small partial assignments (without requiring standard "minimums" or "maximums") while closely scrutinizing late license term assignments that may seek to circumvent the Commission's construction requirements.

## **III. CONCLUSION**

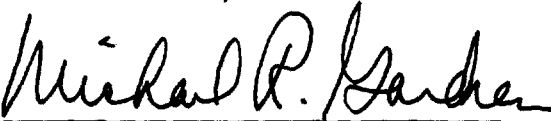
As CellularVision has demonstrated in the New York PMSA, LMDS is a proven, broadband wireless technology that is poised to immediately provide consumers throughout the United States with competitive new choices for interactive video, telephony and data services. For the Commission to fully realize LMDS's tremendous potential in the quickest possible deployment cycle, the Commission must provide flexible, marketplace-driven partitioning and disaggregation rules that will promote maximum involvement by small businesses who are most likely to provide new,

localized services. To achieve this goal, the Commission should individualize its construction requirements with a separate certification process, provide assignees with a renewal expectancy commensurate with their remaining license period, and modify its competitive bidding proposal to reflect marketplace realities as detailed above.

By applying a continued flexible and reasoned regulatory approach to this important final phase of the LMDS rules, the Commission's vision for LMDS will be realized in the near term as LMDS auctions will empower innovative entrepreneurs to provide the panoply of competitive LMDS-based choices in interactive video, telephony and data services throughout the United States.

Respectfully submitted,

CellularVision USA, Inc.

By: 

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Its Attorneys

April 21, 1997

Certificate of Service

I, Michael C. Gerdes, hereby certify that copies of the foregoing "Comments of CellularVision USA, Inc." were delivered by hand, on April 21, 1997, to the following:

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